2001

Mack Financial Corporation v. Nevada Motor Rentals : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MACK FINANCIAL CORPORATION,
Plaintiff-Respondent,

-vs-

NEVADA MOTOR RENTALS, INC.,
Defendant-Appellant.

Case No. 13603

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE BRYANT H. CROFT, JUDGE.

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STATEMENT OF NATURE OF CASE

This is an action to recover a deficiency judgment, costs, and attorneys fees as the result of the defendant-appellant's default under motor vehicle conditional sale agreement.

DISPOSITION IN THE LOWER COURT

The court ruled in favor of the respondent's claim

against the appellant, Nevada Motor Rentals, finding that the respondent was entitled to a judgment for the unpaid balance on its claim against Nevada Motor Rentals on the seven trucks purchased under sales agreements, less the net amount received by the plaintiff upon its sale of the trucks in January, 1972, and less any amount Nevada Motor Rentals would be entitled to as an offset on its counter-claim. The court also allowed the recovery of out-of-pocket expenses incurred in preparing the trucks for public sale and the holding of said sale. The court then ruled that it did not have jurisdiction over W. J. Digby on a personal basis, and therefore dismissed him for lack of jurisdiction. The trial court then found that the seven trucks in question should have been sold in June of 1970 rather than January of 1972, and found that the defendant-appellant had been damaged by loss due to depreciation in the sum of Forty Thousand Seven Hundred Fifty Dollars ($40,750.00), which should be granted by way of offset, leaving a net judgment in favor of the plaintiff-respondent, and against the defendant-appellant, Nevada Motor Rentals, Inc., in the sum of Forty-Seven Thousand Three Hundred Sixty-Seven and 09/100 Dollars ($47,367.09), plus interest at the contract rate, and court costs in the sum of Five Hundred Five and 91/100 Dollars ($505.91). The trial court refused to award attorneys fees to the plaintiff-respondent even though finding that attorneys fees had been contracted for in the agreement of the parties.

RELIEF SOUGHT ON APPEAL

The plaintiff-respondent has filed a cross-appeal and seeks the following relief:

1. A reversal of the trial court's holding that the reasonable time when the seven trucks should have been sold was June 30, 1970, and a determination in its place that the trucks were sold at a reasonable time, which would result in the deletion of the offset in the judgment in the defendant-appellant's favor in the sum of Forty Thousand Seven Hundred Fifty Dollars ($40,750.00), which would result in an increase in the judgment in favor of the plaintiff-respondent in the additional sum of Forty Thousand Seven Hundred Fifty Dollars ($40,750.00).

2. A determination that the court had jurisdiction over W. J. Digby who was, either directly or through the means of agency, doing business within the State of Utah sufficient to subject him to the jurisdiction of the court.

3. A determination that the court erred in holding that no attorneys fees should be awarded the plaintiff, and a direction to the trial court to determine what attorneys fees were reasonable, and award them to the plaintiff pursuant to the terms of the contract.

STATEMENT OF FACTS

The plaintiff-respondent, is in basic agreement with many of the facts stated by the defendant-appellant.

Those are the facts found by Judge Croft in his Memorandum Decision of April 6, 1973, denying defendant's motion for summary judgment. (R. 620) Those facts are listed by number as set out under the defendant-appellant's statement of facts, numbers 1; 2; 3; 4; 5; 6; 7; 8; part of 9, but excluding the wording ". . . and was the only contact which Nevada Motor Rentals had in the State of Utah."; 11, excepting the figure of "$217,-603.05," which should be "$127,603.05"; 12; 13; 14; 15; 16; 17; 18; 19; 20; and 24. The remaining statement of facts made by the defendant-appellant, are not agreed with, inasmuch as they omit certain material aspects of the facts alleged, and to some extent make over-statements of facts unsupported by any evidence.

The following additional statements of fact are pertinent and necessary to the appeal:

1. Even though the seven trucks in question were driven to Mack Trucks, Inc.'s lot in Denver, Colorado, sometime after February 1, 1970, the plaintiff-respondent did not assert any possessory right to said vehicles until January, 1972, at which time said vehicles were repossessed, put in a saleable condition, and sold. (R.18 and Exhibit 17-P)

2. Before the trucks could be sold after their repossession, out-of-pocket expenses totalling Two Thousand Four Hundred Seventy-Seven and 31/100 Dollars ($2,477.31) for preparing the trucks for and holding the sale in January, 1972, were necessarily incurred, and that same amount would have been incurred regard-

less of when in point of time after February, 1970, said trucks had been sold. (R. 83, and Exhibit 17-P and 18-P)

3. After the seven trucks were abandoned on the lot of Mack Trucks, Inc. in Denver, Colorado, and Mack Financial Corporation learned of their abandonment, Don Digby and Lee Scott were requested by Mack Financial Corporation to submit a proposal in disposing of the trucks at that time, and then agreeing upon how a deficiency would be handled and taken care of; but Don Digby, for Nevada Motor Rentals, failed to contact Mack Financial Corporation concerning such a proposal. (R. 16-17)

4. From the time the seven trucks in question were abandoned on a lot of Mack Trucks, Inc. in Denver, Colorado, up to the time they were repossessed by Mack Financial Corporation in January, 1972, the maximum depreciation on each truck amounted to Three Thousand Dollars ($3,000.00), for a total of possible maximum depreciation of Twenty-One Thousand Dollars ($21,000.00). (R. 113)

5. The transaction between Nevada Motor Rentals, entered into just prior to the abandoment of the trucks by Scott to Nevada Motor Rentals, and then Nevada Motor Rentals to Mack Trucks, Inc. involved not only the purchase or transfer of seven trucks, but also other trucking considerations including a meat haul out of Gooding, Idaho, and a beer haul from Colorado to Idaho. (R. 161)

6. Notice of the sale of the seven vehicles in question, after their repossession in January, 1972, was given by publication in the Denver Post, the Rocky Mountain News, and the Adams County Almanac. Notice was also sent to the attorney for the Nevada Motor Rentals, Inc. dated January 11, 1972. (Exhibits 5-P, 6-P, 7-P, and an unnumbered page between R. 453 and 454, R. 690-691)

7. The defendant-appellant, on February 15, 1969, executed an extension of conditional sale agreement for chattel mortgage, which covered transactions including the seven trucks in question in the lawsuit, and as a term of said contract agreed that if said contract was placed in the hands of an attorney for collection, it, as the buyer, would pay the reasonable attorneys fees incurred by the plaintiff-respondent. (Exhibit 3-P and 4-P)

ARGUMENT

POINT I

THE UTAH COURT HAS JURISDICTION OVER NEVADA MOTOR RENTALS, INC.

The appellant, in its brief, characterizes the visit of Donald Digby, an officer and agent of Nevada Motor Rentals, Inc. in the State of Utah as a mere conversation in which no actual business was performed. This, however, is not born out by the record. The record reflects that Mr. Digby of Nevada Motor Rentals, Inc. came

to Utah, and specifically to the office of Mack Financial Corporation in Salt Lake City, Utah, for the express purpose of persuading them to contact Lee Scott of Boise, Idaho, and making arrangements with him to purchase the seven trucks in question from Nevada Motor Rentals, Inc. under a treasury transfer agreement wherein he was to assume the obligation of Nevada Motor Rentals, Inc., without, however, relieving them of their liability to Mack Financial Corporation in the event Lee Scott defaulted on the payments. (R. 5)

The entire situation which brought about the litigation presently before the court had its origin with that visit of Mr. Digby, the Vice-President of Nevada Motor Rentals, Inc. with Mack Financial Corporation in the State of Utah. Title 78-27-24, Utah Code Annotated, 1953, cited and relied upon by the appellant in its brief gives the Utah Court jurisdiction over any person who, in person or through an agent, transacts "... any business within this State."

After the business transaction was set up in the State of Utah by the appellant's Vice-President, the contract was then made so as to be performable within the State of Utah.

This court's treatment of jurisdictional questions under the provisions of Title 78-27-24, U.C.A., 1953, in both the *Hill v. Zale Corporation,* 25 Utah 2d 357, 482 P. 2d 332, cited by the appellant, and in the decision handed down in *Foreign Study League v. Holland-American Line,* 27 Utah 2d 442, 49 P. 2d 244, has

been consistent with the generally accepted notion that jurisdiction of the court should be expanded where the rights of its inhabitants have been affected by some conduct carried on within the State. If the conduct of Mr. Digby, the Vice-President of Nevada Motor Rentals, Inc., in coming to Utah and arranging for a transaction which ultimately goes sour, and results in a dispute over responsibility for the payment of trucks, does not constitute the doing of any business within the State, then it would be very difficult to formulate an instance in which a non-resident would under any circumstances be doing business within the State.

In addition to that particular activity, the trucks of Nevada Motor Rentals, Inc., which are leased to Digby Truck Lines, are operated through Utah and upon the public highways of the State of Utah, which, is an additional act of doing business within the State. (R. 156)

POINT II

IF THE SALE OF THE SEVEN TRUCKS IN QUESTION WAS NOT "COMMERCIALLY REASONABLE," THE PROPER MEASURE OF DAMAGES, UNDER THE APPLICABLE LAW, WOULD BE THE ACTUAL LOSS CAUSED BY A FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE UNIFORM COMMERCIAL CODE.

The trial court found in its findings of fact that the sale of the vehicles in 1972 was commercially unreasonable because it was delayed by a period of nearly two years. The court further found that the reasonable time when the seven trucks should have been sold was June 30, 1970, and that had the seven trucks in question been sold on June 30, 1970, they would have brought Forty Thousand Seven Hundred Fifty Dollars ($40,-750.00) more than they did when sold January 25, 1972. The court accordingly allowed the appellant as an offset against the judgment awarded to the respondent the sum of Forty Thousand Seven Hundred Fifty Dollars ($40,750.00).

The appellant cites three "leading cases" that supposedly represent a "majority view" where the court allegedly denied a deficiency where the sale was not commercially reasonable. In reading those three cases, however, the deficiency was denied not because the sale was commercially unreasonable, but because the debtor was not given notice of the sale by the creditor. That, of course, was one of the contentions of the appellant at trial and is also raised on appeal under another point; however, the trial court found that notice had, in fact, been given to the debtor-appellant by the creditor-respondent. (R. 690, Finding #13)

Appellant then goes on to argue that some courts under the old Uniform Conditional Sales Act also held that where a sale was commercially unreasonable that a deficiency judgment would not be allowed, and in

support thereof, they cite two West Virginia cases, one decided in 1926 and one decided in 1930.

The Uniform Commercial Code, which has, for the most part, been adopted by the State of Utah, and all of the other states where any of the parties to the action had any business dealings, specifically provides that a debtor's exclusive remedy for violations of the act is a Section 9-507-(1) claim for damages. That section of the Utah Commercial Code is Title 70A-9-507(1), 1953, and reads, as the Uniform Commercial Code, as follows:

> "If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred, the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time-price differential plus 10% of the cash price."

Neither that Section, nor any other section of the Commercial Code, suggests that the proper remedy is punitive in nature, as suggested by the appellant, which would deny a deficiency judgment to a secured party

who failed to comply with the Commercial Code by dotting every "i" and crossing every "t," or in creating a presumption that after an improper sale, the actual value of the collateral is presumed to equal the debtor's obligation.

In reading the Commercial Code, and the cases decided under it, it appears that the debtor's exclusive remedy after discovering that some aspect of the sale was commercially unreasonable, is a Section 9-507 (1) claim for damages. A case which illustrates this point is *Abbot Motors, Inc. vs. Ralston,* 28 Mass. App. Dec. 35, 5 U.C.C. Rep. 788 (1964). In that case, the court was dealing with a secured party's suit for a deficiency judgment after the secured party failed to proceed in accordance with Section 9-504(3). In agreeing with the creditor's contention that conducting a sale in other than a commercially reasonable manner does not bar the recovery, but only gives the debtor a Section 9-507-(1) claim for damages, the court stated that the "Defendant is not executed from his debt because of an error in the procedure of his secured creditor in applying the collateral upon his debt and unless it is plainly so provided by the statute." Id 43.

The New York Supreme Court, in the case of *Chase Manhatten Bank v. Lyon Hair, Inc.,* 8 U.C.C. Rep. 1121, (N.Y. Sup. Ct. 1971), agreed with the position taken in *Abbot* and held that the debtor's contention that the secured party's failure to comply with Section 9-504(3) absolved him of liability was without merit. The court simply reasoned that Section 9-507 sets out

the penalty for non-compliance with Section 9-504, and relieving the debtor from liability is not among the remedies prescribed.

The Washington Supreme Court reached a similar decision; however, that was concerning the notice provision violation of Section 9-504, and would, therefore, be a case contrary to those cited by the appellant in its brief under this point. See *Grant County Tractor Company, Inc. v. Nuss*, 496 P. 2d 966, 6 Wash. App. 866 (1972). That was an action by a seller-creditor of a tractor and other farm equipment against the buyers for a deficiency. The creditor came into possession of the debtor's tractor, which was held as security, and in the course of events sold the tractor without first giving notice to the debtor-defendant. The trial court found that the balance due on the contract for that amount was $3, 507.00, but refused to enter judgment for that amount " . . . because plaintiff failed to give notice to the defendants of the sale of the tractor." The creditor excepted to the trial court's ruling, and filed the appeal.

The Washington Supreme Court, in reversing the trial court's denial of a deficiency judgment, cited the line of authority relied upon by the appellant in this case, namely, Leasco case and the Skeels case, and then go on to adopt the other line of authority. In doing so, they state:

> "***The other line of authority holds that the failure to give notice does not prevent a deficiency. *Universal C.I.T. Credit Company v.*

Rone, 453 S.W. 2d 37, (Ark. 1970); *Weaver v. O'Meara Motor Company,* 452 P. 2d 87 (Alas. 1969); *T & W Ice Cream, Inc. v. Carriage Barn, Inc.,* 107 N.J. Super. 328, 258 A. 2d 162 (1969); *Mallicoat v. Volunteer Fin. & Loan Corporation,* 415 S.W. 2d 347 (C.A. Tenn. 1966). We adopt the reasoning of the second line of cases.

"R.C.W. 62 A. 9-504(2), quoted above, provides that the debtor is liable for a deficiency, if there is no agreement to the contrary. R.C.W. 62 A. 9-507(1), provides:

> '(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered to or restrained on appropriate terms and conditions. If the disposition has occurred, the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party in the loss caused by a failure to comply with the provisions of this part.
>
> 'Under this provision, if the creditor fails to give notice to the debtor as required by R.C.W. 62 A. 9-504(3), the debtor has a right to recover from the creditor any loss caused by the failure to give that notice. Thus, in the instant case, if the sale of the tractor without notice had resulted in a loss to the defendants, the defendants would have a right in the instant proceed-

> ing to claim that loss against the deficiency sought by the plaintiff. In view of this remedy, we are of the opinion the writers of the Uniform Commercial Code did not intend that the creditors' failure to give notice would result in a forfeiture of the creditors' right to a deficiency. See ***Hogan, Pitfalls in Default Procedure,*** 2 U.C.C. L.J. 244, 257 (1969).'

The appellants seek to broaden the application of Section 9-507 to the point of its being a punitive statute, and in doing so, read into it terms that it does not contain. A logical analysis of that Section indicates that it is compensatory in nature, and that it sets out the remedy of the secured party to recover "any loss caused by a failure to comply with the provisions" of the act. That is the construction given it by the trial court wherein the trial court found that the loss occasioned by the failure to hold the sale in a commercially reasonable manner was Forty Thousand Seven Hundred Fifty Dollars ($40,750.00). Even though the respondent does not agree with that figure, and will hereafter assert that the maximum amount of the offset should have been Twenty-One Thousand Dollars ($21,000.00), the respondent takes the position that the court properly applied the damage statute of the Commercial Code by assessing damages rather than resorting to a harsh forfeiture position advocated by the appellant.

The trial court's application is consistent with the Utah Supreme Court's position taken in the case of

Andreasen v. Hansen, 8 U.2d 370, 335 P.2d 404, wherein the court announced its position as being opposed to forfeitures, and adopting the rule that damages rather than forfeitures are favored.

POINT III

THE COURT HAVING FOUND THE APPELLANT RECEIVED NOTICE OF THE SALE, THE APPELLANT'S CONTENTION THAT NO DEFICIENCY JUDGMENT MAY BE ASSESSED WHERE NOTICE OF SALE IS ABSENT OR DIFICIENT IS MOOT.

Even though, under the provisions of Section 9-504 (3), the notice requirement relied upon by the appellant is not required, the trial court found that, in fact, notice had been given.

Sub-Paragraph (3) of Section 9-504 of the Commercial Code does away with the necessity of notice if the "collateral is perishable or threatens to decline speedily in value, *or* is of a type customarily sold on a recognized market." (Emphasis added.) The seven trucks in question were, as the trial court noted in its Memorandum Decision denying defendant's motion for summary judgment, were of the "type customarily sold on a recognized market," so there really was no need for a notice. (R. 633)

The court did, however, after considering all of the evidence, including respondent's counsel's letter to the

appellant's counsel dated January 11, 1972, (unnumbered page between R. 453 and R. 454) and the showing proof of publication in three newspapers of general circulation in the area where the sale was held (Exhibit 5-P, 6-P, and 7-P), found that notice of the sale had been given to the appellant. (R. 690, Finding No. 13)

The facts of the case before the court are also similar, and even identical on this point, with the facts of the earlier cited Washington Supreme Court case of *Grant County Tractor Company v. Nuss,* 496 P. 2d 966, 6 Washington App. 866 (1972). In that case, as in the instant case where the debtor unilaterally and voluntarily delivered the seven trucks in question to Mack Trucks, Inc., with, according to their testimony, the express intention of giving them complete control of the security, noting that the debtor did the same thing in the *Grant Company Tractor* case, the Washington Supreme Court stated:

> "Further, it should be noted that defendants unilaterally and voluntarily delivered to plaintiff complete control of the security and gave written notice of their election to rescind the transaction. It has been held that such conduct constitutes a waiver of the debtor's right to reasonable notice of an impending sale or estops the debtor from claiming a violation of the statute. *Nelson v. Monarch Investment,* Inv. Plan of Henderson, Inc. 452 S.W. 2d 375 (C.A. Ky. 1970)"

Also, even if the trial court had found that notice

had not been given, the remedy under the Commercial Code for that violation is also Section 9-507(1), which makes the debtor's exclusive remedy a claim for damages, and is not punitive in nature so as to deny him a deficiency. That, however, does not even come into play in this case inasmuch as the trial court did make a finding, based upon competent evidence, that the appellant received notice of the sale, both directly, and through its being published in three newspapers of general circulation where the sale was held and where the appellants were doing business.

POINT IV

THE TRIAL COURT'S DETERMINATION THAT THE SEVEN VEHICLES IN QUESTION DEPRECIATED IN THE SUM OF FORTY THOUSAND SEVEN HUNDRED FIFTY DOLLARS ($40,750.00) IS INCORRECT, AND THE MAXIMUM AMOUNT OF DEPRECIATION, AND THEREFORE THE APPELLANT'S MAXIMUM DAMAGES, IS ONLY TWENTY-ONE THOUSAND DOLLARS ($21,000.00).

The testimony presented at trial concerning the value of the vehicles in question came from Mr. Roddy, who has been in the trucking business as a salesman and mechanic for many years for several different companies; Mr. Alward, who had been in the truck sales business for approximately one year at the time he saw "some

trucks" belonging to Nevada Motor Rentals, Inc., and then three current employees of the appellant who testified they had certain sums of money that they would have been willing to pay for trucks, but which they admittedly would not have paid for the trucks without first having driven them, ascertained their mechanical condition, etc.

The testimony of all of the witnesses was admittedly in conflict, and the trial judge, sitting as both the trier of the law and of the fact, had to make a determination from all of the evidence as to what the true facts were.

The appellant relies heavily upon the testimony of Donald Digby to the effect that the trucks must have been worth $18,000.00 each inasmuch as he had entered into a recent business deal with Lee Scott to purchase the trucks for that sum of money; however, after Mr. Scott had the trucks for a few days he, for some reason or the other, returned them to Mr. Digby at Nevada Motor Rentals, Inc. Also, the transaction entered into between Scott and Nevada Motor Rentals, Inc. involved more than the mere purchase of seven trucks, but also involved arrangements for meat hauls out of Idaho, and beer hauls into Idaho, and other transportation considerations. (R. 161, R. 692)

When Mr. Alward appraised a group of trucks at Nevada Motor Rentals' yard in Denver, Colorado, in January, 1970, he had been in truck sales for one year. (R. 186) He looked at a group of Mack Trucks and White Freightliners, 1967 and 1968 models, and made

appraisals for the purpose of offering a trade-in price on some of the used trucks in connection with a deal he was trying to make to sell them new trucks. (R. 195) At the time of trial in April, 1973, he did not have any appraisals with him, had not reviewed them prior to the trial inasmuch as he didn't know why he was appearing at trial, and had no idea of what trucks, by serial number, he had even appraised, but only that there were some 1967 model and some 1968 model Macks and White Freightliners. (R. 184 - 187)

The Nevada Motor Rental employees who testified that they would be willing to pay $16,000 to $18,000 to purchase a vehicle admittedly did not drive the vehicles, or otherwise test them, and would not have paid that kind of money for a truck without first driving it, having it tested, and otherwise determining that it was worth that kind of money, and their testimony was not, therefore, to the effect that the seven vehicles in question, or any of them, were worth anywhere near from $16,000 to $18,000. (R. 207 - 225)

John Roddy, who is the used truck manager of the Mack Trucks, Denver, Colorado, branch testified that he had made periodic appraisals of the seven vehicles in question from the time Nevada Motor Rentals abandoned the vehicles on the Mack Trucks' lot in Denver and produced copies of the appraisals made by him. (Exhibit B-19 and B-20)

Mr. Roddy's experience in the heavy trucking business is extensive and goes back many years. In

addition to his employment with Mack Trucks, Inc. both as Service Manager and Used Truck Manager, he has been employed over the years by General Motors, International Harvester, Colorado Kenworth, Ford Motor Company, and other trucking concerns.

Having inspected and appraised the trucks from time to time during the two-year period they were on the Mack Truck lot in Denver, Colorado, he expressed an opinion, based upon his background and his knowledge of the trucks, that the units had depreciated in the toal sum of Three Thousand Dollars ($3,000.00) per unit over the two-year period. (R. 113) The total depreciation of the seven units was, therefore, according to Mr. Roddy's expert testimony, the total sum of Twenty-One Thousand Dollars. ($21,000.00)

POINT V

THE OUT-OF-POCKET EXPENSES IN THE SUM OF TWO THOUSAND FOUR HUNDRED SEVENTY-SEVEN AND 31/100 DOLLARS ($2,477.31) WERE NECESSARILY INCURRED TO PREPARE THE TRUCKS FOR SALE, AND WOULD HAVE NECESSARILY BEEN INCURRED REGARDLESS OF WHEN THE TRUCKS WERE SOLD.

The appellant fails to cite any portion of the record

in support of the contentions raised in Point V of its brief.

John Roddy, the Utah Truck Manager of Mack Trucks' Denver, Colorado, branch, who was involved with the sale of the trucks after reviewing the exhibits representing the Two Thousand Four Hundred Seventy-Seven and 31-100 Dollars ($2,477.31) expended by Mack Financial Corporation in preparing the trucks for sale, including advertising them, and who was involved in getting them ready for sale and conducting the sale, at the request of Mack Financial Corporation, testified that the charges were reasonable and necessary, and that the same charges would have been necessarily incurred regardless of when in point of time the trucks had been sold after they were abandoned on the Mack Trucks' lot by Nevada Motor Rentals, Inc. (R. 83)

The contention of Point V of the appellant's brief is, therefore, unsupported by the record, and the out-of-pocket expenses incurred by the respondent in advertising the sale of the trucks, and in getting them ready for sale so as to obtain the best possible price for them, is a recoverable expense, as was found by the trial court.

POINT VI

THE COMPUTATION OF THE COURT OF THE JUDGMENT IN THE SUM OF FORTY-SEVEN THOUSAND THREE HUNDRED SIXTY-SEVEN

AND 09/100 DOLLARS ($47,367.09) WAS CORRECT, USING THE FIGURES OTHERWISE FOUND BY THE COURT, BUT THAT FIGURE SHOULD BE REVISED UPWARD AFTER REDUCING THE AMOUNT OF THE SETOFF AWARDED IN FAVOR OF THE APPELLANT.

The computation used by the court in arriving at the Forty-Seven Thousand Three Hundred Sixty-Seven and 09/100 Dollars, ($47,367.09), figure is as follows:

Explanation	*Amount*
April 15, 1970, Payoff	109,673.97
Interest to June 30, 1970	2,399.12
Total Due on June 30, 1970	112,073.09
Less Loss for Non-Sale as of June 30, 1970	-40,750.00
Total Due after Adjustment on June 30, 1970	71,323.09
Interest from July 1, 1970, to June 30, 1971	7,488.92
Total Due as of June 30, 1971	78,812.01
Interest from July 1, 1971, thru January, 1972	4,827.24
Total Due through January, 1972	83,639.25
Costs of Sale	2,477.31
Less Sales Price	-44,700.00
Balance After Sale	41,416.56
Interest from February 1, 1972, to January 31, 1973	4,348.74
Total Due as of January 31, 1973	45,765.30

Interest from February thru May, 1973	1,601.79
Total Amount of Judgment	47,367.09

The trial court, in using the above figures, makes a clear and accurate accounting by breaking the figures at each occasion where a significant event occurred. By handling the accounting in that manner, the appellant is charged interest on the appropriate amount owing to the respondent within the frame work of time when certain significant events occurred to change the principal amount the appellant owed the respondent.

The appellant's contention was considered by the trial court both originally, and on the appellant's post-trial motions, and was rejected by the trial court inasmuch as it did not consider the fact that the principal amount the appellant owed the respondent changed from time to time with the happening of certain events, and would, therefore, have to be computed separately for each change in the principal amount on which interest could be charged. The appellant's proposal, which was rejected by the trial court, was and is that interest should only be charged on the lowest amount of principal owed at any given time, rather than computed separately on the changing amount of principal owed as that amount would change with the occurrence of events as found by the court.

The respondent, by way of cross-appeal, contends that the only figure that should be changed is the setoff in the sum of Forty Thousand Seven Hundred Fifty

Dollars, ($40,750.00), under the explanation of "Less Loss for Non-Sale as of June 30, 1970," and that said figure should be readjusted to a maximum of Twenty-One Thousand Dollars, ($21,000.00), if the court finds that the trucks should have been sold on June 30, 1970, or completely eliminated, if the court finds that the respondent had no duty to sell the trucks as of June 30, 1970.

POINT VII

THE RESPONDENT DID NOT HAVE AN OBLIGATION TO REPOSSESS THE SEVEN TRUCKS IN QUESTION UNTIL THE TIME IT DID SO, AND THE APPELLANT IS NOT, THEREFORE, ENTITLED TO A FORTY THOUSAND SEVEN HUNDRED FIFTY DOLLARS, ($40,750.00), OFFSET, AND THE TRIAL COURT'S JUDGMENT SHOULD BE INCREASED BY THAT AMOUNT.

As set out in the appellant's Statement of Fact, the transaction involved in this case was not a clear-cut one-to-one transaction, but was complicated by the fact that after Scott Trucking Company acquired some interest in the seven vehicles in question in a transfer between the appellant and itself, and agreed to by the respondent, Scott Trucking started returning the trucks to the appellant, who in turn took them to Mack Trucks,

Inc.'s Denver, Colorado, branch where they abandoned them. Thereafter, Mr. Adams of Mack Financial Corporation attempted to get Scott Trucking and Nevada Motor Rentals to agree upon the disposition of the vehicles, and agree how the two interested parties would take care of a deficiency. After no response was received from Scott Trucking or Nevada Motor Rentals, a legal action was commenced to resolve the dispute, but because of jurisdictional problems, Scott Trucking Company could not be retained in the Utah action and refused to cooperate in having the trucks voluntarily repossessed and sold. It was not until January of 1972 that the parties reached agreement that the trucks could be repossessed and sold without affecting the rights of the other parties involved, and immediately upon Scott Trucking Company's consenting to the repossession and sale the seven trucks were repossessed and sold within a very short period of time.

While the Uniform Commercial Code may have given the respondent the right to repossess and re-sell the vehicles in question, it certainly did not impose upon it the duty to do so. To the contrary, the Uniform Commercial Code specifically provides that the seller can elect the remedy that he wishes to pursue against the defaulting buyer under a security agreement. In Section 9-501 (1), it states:

> "When a debtor is in default under the security agreement, a secured party has the rights and remedies provided in this part . . . and those

> provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."

The respondent in the instant case chose initially to pursue the remedy of requiring the defendant to pay on the contract. The respondent did not choose initially to repossess the vehicles and to sell them at public or private sale. Accordingly, the appellant should not be allowed to abandon the vehicles on the respondent's sister corporation's property, and force the respondent to elect the remedy of repossessing the vehicles. As noted above, the respondent did not repossess the vehicles until January of 1972, but to the contrary requested that the appellant remove the vehicles from its sister corporation's lot.

In *Auto Cars Sales and Service, Inc. v. Hansen*, 270 N.Y. 414, I N.E. 2d 830 (1936), a truck was sold by the plaintiff to the defendant under a conditional sales contract. The truck was damaged and the insurance company insuring for the benefit of both the plaintiff and defendant, ordered that the truck be taken to the plaintiff- seller's lot. During the time the truck was on the plaintiff's lot, the plaintiff never offered to return the truck to the defendant, and the defendant never offered to pick it up, and there was never a demand made for its return. The defendant argued that inasmuch as the truck was in the possession of the plaintiff, he had repossessed the truck, and had failed to resell the

truck within the 30-day statutory period. The court rejected the defendant's argument, and pointed out that the plaintiff had never taken any steps itself or through the sheriff or any other agent to take possession of the truck, and that the plaintiff had not, within the meaning of the statute, repossessed the truck and therefore should not be denied deficiency judgment.

In the instant case, not only did the plaintiff-respondent, Mack Financial Corporation, not take any steps to repossess the trucks, but specifically demanded that the defendant-appellant get the trucks off the plaintiff-respondent's sister corporation's lot.

A similar situation occurred in *Brandon v. General Motors Acceptance Corporation,* 223 Ark. 850, 268 S.W. 2d 898 (1954), where the defendant-purchaser abandoned his automobile, and the creditor took possession of the automobile only to protect and preserve the automobile. The court ruled that there was no repossession under the contract at the time the automobile was abandoned, and that therefore once the vehicle was sold, the creditor was entitled to a deficiency judgment. In accord with that decision, is also *Newberry v. Morris,* 233 Ark. 938, 349 S.W. 2d, 652 (1941). See also *Kahl v. Winfrey,* 81 Ariz. 199, 303 P. 2d 526 (1956), where the court ruled that a voluntary surrender of merchandise was not a "re-taking" or repossession by the seller that would compel the re-sale within 30 days as provided in the statute.

In light of the restrictions placed upon a creditor

in re-taking its security by the United States Supreme Court's decision of *Fuentes, et. al. v. Shevin, et. al.*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), the respondent was justified in not electing to repossess the vehicles until the time it repossessed them, and after repossessing them, considering the fact that they had to be conditioned for the sale, and the sale had to be advertised sufficiently, that the sale was totally reasonable, and the appellant should not have received the offset in the sum of Forty Thousand Seven Hundred Fifty Dollars, ($40,750.00), and that amount should be added to the judgment already entered by the trial court in respondent's favor.

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO AWARD THE RESPONDENT ATTORNEYS FEES, AND THE CASE SHOULD BE REMANDED FOR THE PURPOSE OF HAVING THE COURT TAKE EVIDENCE ON THAT POINT, AND ENTERING AN AWARD FOR REASONABLE ATTORNEYS FEES.

The extension of conditional sale agreement or chattel mortgage executed between the appellant and the respondent, (Exhibit 3-P and 4-P), provides: "If this agreement shall be placed in the hands of an attorney for collection, the buyer shall pay to Financial

reasonable attorneys fees as specified in said document, if permitted by law." Based upon that provision for attorneys fees, the respondent sought recovery of its attorneys fees; however, the trial court denied the award of attorneys fees based upon the possibility that had the seven trucks in question been sold by June 30, 1970, the appellant may have paid the deficiency to the plaintiff on a voluntary basis, and thereby have avoided the lawsuit. There was, however, no evidence that they would have done so, and as a matter of fact, the respondent had filed its lawsuit against the appellant prior to that time.

This court has recognized the rights of parties to contract and the court's obligation to enforce those contracts on many occasions. In particular, this court has recognized the rights of parties to contract for the payment of attorneys fees and have recognized the court's duty to enforce those contracts, leaving to the court the right to discipline the attorney if the fee charged is unconscionable. See *Thatcher v. Industrial Commission,* 207 P. 2d 178.

Even though the Utah Supreme Court has never dealt with the exact question raised by the trial court's denial to award attorneys fees based upon the contract being sued upon, there is no authority known to the respondent whereby that provision of the contract should be disregarded where the court enforces all of the other conditions of the contract.

The fact that the appellant continues to resist the

payment of anything to the respondent, even after the trial court awarded it a offset in the sum of Forty Thousand Seven Hundred Fifty Dollars, ($40,750.00), is indictive that at no point in time would the appellant have voluntarily settled a deficiency, but is evidence of the fact that the appellant has been and is totally unwilling to pay damage it has caused the respondent by its breach of the sales contract.

CONCLUSIONS

It is respectfully submitted that the court should sustain the trial court's decision in part and reverse it in part, by deleting the offset in the sum of Forty Thousand Seven Hundred Fifty Dollars, ($40,750.00), and also directing the trial court to take evidence concerning reasonable attorneys fees, and to award the respondent its fees incurred for legal services in prosecuting the action against the appellant.

Respectfully submitted,

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By _____

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